TENDENCIES IN PRIMARY LEGISLATION.

In few departments of legislation do the states of the Union show greater diversity than in their primary election laws. These laws in some cases are made applicable to particular cities or counties only; in others, to the entire state. The operation of several of them is dependent upon acceptance by party committees or by the electors in local administrative divisions; while the greater number are mandatory. Moreover they differ in content no less than in the range of their application. In a number of states they simply impose penalties for corrupt practices, leaving to the party the development of a nominating system. In others, these negative provisions are supplemented by positive rules to govern the procedure at primary elections. Finally, four states have removed the primary from the jurisdiction of the party committee and placed it under the authority of a Board of Election Commissioners or some similar body. In view of the general tendency toward uniform legislation, such diversity in the treatment of the nominating problem may well excite surprise.

It is evident, however, from the history of primary legislation that this lack of uniformity is a result not of diverse tendencies but of the unequal progress which different states have made in a common course of development. The more primitive types of legislation, which now prevail in a majority of the states, correspond to the early stages in the evolution of the more advanced systems. This will become apparent as we trace the course of development in Ohio and New York—the states in which the movement has been carried farthest—and then take a general survey of existing legislation.

In Ohio the first primary election law, passed in 1871, seems to have been designed to strengthen, rather than to supersede, the authority of the party committee. It offered

to political parties, but did not require them to accept, the privilege of conducting primary elections under a system of rules prescribed and enforceable by law. As this act (or rather the earlier California act of which it is a literal copy) has served as a model for subsequent legislation in several other states, an outline of its essential provisions will be of interest.

I. Elections of voluntary political associations may be called by a published notice which shall state:

(1) The purpose, time, manner and conditions.
(2) The authority by which the call is issued.
(3) The name of a legal voter to act as "supervisor" of the election.
(4) The qualifications of voters, which must not be inconsistent with those expressed in the act.

II. The supervisor must take an oath to the effect that he is a legal voter of the district and will faithfully conduct the election and canvass and report the votes cast, as required by the authority calling the election.

He shall cause the qualified electors present to choose two judges and two clerks, and administer to each of them the same oath taken by himself.

III. Any qualified elector may challenge a voter on the ground:

(1) That he is not entitled to vote under the terms of the call.
(2) That he is not a citizen of the United States and a qualified elector of the district.
(3) That he has received or been promised a bribe.
(4) That he has previously voted on the same day.

The supervisor or one of the judges must interrogate the challenged voter under oath. If he refuse to answer, his vote must be rejected; but if he answer the questions satisfactorily and be not successfully contradicted by the sworn testimony of others, it must be accepted.

IV. Violation of the act by the "supervisor" or judges, as also fraud or bribery committed by electors, are made misdemeanors.

V. The act is applicable only when the published notice so states. *

In 1886 an amendment † was added, enabling party committees in Cincinnati to proceed a step further towards the legalization of the nominating system. It provided that, in

* Act of February 24, 1871. *Vide*, Table of Laws, *seq.*
† Act of May 17, 1886.

cities of the first grade of the first class, primary elections, when advertised as required by law, should be conducted at public expense, in accordance with the election code, by the judges and clerks of election belonging to the respective political parties. Two years later * this provision, slightly modified, was extended to Cleveland, Columbus, Toledo and Dayton. And again in 1898 came another special act † applicable to Cincinnati which places the primaries permanently under the authority of the Board of Elections.

By a quite different process New York has developed a similar system. Primary legislation in the Empire State began in 1866 ‡ with a short paragraph making bribery or menace a misdemeanor. The next act § prescribed penalties for various kinds of fraud and also a number of positive rules to be observed at primary elections. Originally limited in application to the counties in which Brooklyn and Buffalo are situated, it was subsequently applied to the entire state.‖ In 1887 the primaries in cities of over 10,000 inhabitants were placed under a quite elaborate system of positive rules,¶ which, five years later, were extended to cities of 5,000.** And finally in 1898 the duty of conducting primary elections in cities having a population of over 50,000 was made a state function.††

In the foregoing sketch we see: (1) That acts originally applicable only to the principal cities are subsequently extended to larger areas; and (2) that successive enactments for the same territory show a progressive subjection of the primaries to public authority.

* Act of April 16, 1888.

† Act of April 25, 1898. This act was declared invalid on technical grounds in a case reported as this article was going to press. *Vide*, City of Cincinnati *v.* Members of the Board of Elections, *Weekly Law Bulletin*, March 27, 1899.

‡ Act of April 24, 1866.

§ Act of May 13, 1882.

‖ Act of May 11, 1883.

¶ Act of May 2, 1887.

** Act of May 18, 1892.

†† Act of March 29, 1898.

Turning to other states, and confining our attention to the most advanced enactments in each, the early stages of a similar development may be seen. As a rule, the first act is characterized by the effort to avoid impairing the authority of the party over its own affairs. The provisions are either purely negative—penalties for corrupt practices, etc.—as was the case in New York; or, like the first Ohio law, valid only after acceptance by the party authorities. Of the states which may be said to have taken but the first step in primary legislation, Colorado,* Connecticut,† Iowa,‡ Indiana,§ Louisiana,‖ North Dakota¶ and Texas** have adopted the former course, while Arkansas,†† California,‡‡ Florida,§§ Kansas ‖‖ and West Virignia¶¶ have taken the latter.

The legislatures of eighteen states have advanced a step further, passing mandatory acts which not only prohibit corrupt practices but prescribe in greater or less detail the procedure to be observed at primary elections. Though classed together, as embodying the same principle, these acts present a striking variety of detail. In eight states*** the provisions are so meagre as to leave the authority of the party committee practically unrestricted. In Michigan,††† Minnesota,‡‡‡ Oregon §§§ and Washington,‖‖‖ the law prescribes

* Act of April 4, 1887.
† Act of May 1, 1883.
‡ Act of April 7, 1898.
§ Act of March 9, 1889.
‖ Act of July 5, 1890.
¶ Dakota Ter., Act of March 13, 1885. N. D. Act of March 20, 1890.
** Act of April 8, 1895.
†† Act of April 20, 1895.
‡‡ Political Code of 1874. Title II, chap. IV.
§§ Act of June 11, 1897.
‖‖ Act of March 10, 1891.
¶¶ Act of March 5, 1891.
*** Georgia Act of October 21, 1891; Maine Act of March 3, 1887; Maine Act of March 26, 1897; Montana Annotated Code; Nebraska Act of March 26, 1887; Nevada Act of February 5, 1883; New Jersey Act of May 9, 1884; Pennsylvania Act of June 29, 1881, South Carolina Act of December 22, 1888.
††† Act of May 13, 1895; Act of May 16, 1895.
‡‡‡ Act of April 25, 1895.
§§§ Act of February 11, 1891.
‖‖‖ Act of March 21, 1895.

a few general rules of procedure; while acts in force in Kentucky,* Mississippi,† and the cities of Boston,‡ Milwaukee,§ Richmond,‖ and Wilmington,¶ make provision for nearly all details.

In a number of these acts we see a tendency to place the primary on a legal equality with the regular election. Thus in Kentucky,** and Washington †† and in the cities of Boston,‡‡ Richmond,§§ Milwaukee|||| and Wilmington¶¶ the use of a blanket ballot is required. In the city of Richmond*** the judges and clerks have the same "rights, powers and privileges" and are subject to the same penalties as election officers. While in Kentucky,††† Mississippi‡‡‡ and in the city of Boston, §§§ primary elections must in all points not otherwise provided for be conducted according to the election law.

Still more significant of the trend of development is the assignment of various duties connected with the primaries to the public officials who perform analogous functions under the electoral systems. In Boston,|||||| Detroit¶¶¶ and

* Act of June 30, 1892.

† Annotated Code of 1892, chap. 105.

‡ Act of June 5, 1895. Applies to Boston and other cities which adopt it. Embodied in the Election Code of 1898 (chap. 548 of the Laws of 1898), as sections 99–131.

§ Act of April 23, 1897. Applicable to counties having over 200,000 inhabitants (Milwaukee), cities of the first and second classes, and cities of the third and fourth class when adopted by popular vote.

‖ Act of February 20, 1896. Applies to Henrico County (Richmond).

¶ Act of May 27, 1897. Applicable to New Castle County (Wilmington).

** Act of June 30, 1892, § 1564.

†† Act of March 21, 1895, §§ 9, 10.

‡‡ Election Code of 1898, §§ 117, 118.

§§ Act of February 20, 1896, § 6.

|| Act of April 23, 1897, §§ 6, 8.

¶¶ Act of May 27, 1897, § 39.

*** Act of February 20, 1896, § 4. Similar provision occurs in the Act of March 3, 1892, applicable to Portsmouth; the Act of March 3, 1896, applicable to Accomac and Northampton Counties; and the Act of January 12, 1898, applicable to Charlottesville.

††† Act of June 30, 1892, §§ 1551, 1560, 1562, 1564.

‡‡‡ Annotated Code of 1892, chap 105, § 13.

§§§ Election Code of 1898. §§ 121, 127.

|||| Election Code of 1898, § 105.

¶¶¶ Act of May 16, 1895, § 4.

the larger cities of Wisconsin * the regular election booths are erected and ballot boxes provided at public expense. The registering officers are required in Wilmington,† Del., to provide special "voting books" for primary elections, and in Kentucky ‡ to register the party affiliation of voters. In Boston official primary ballots are printed by the Election Commissioners, who are further authorized to preserve the ballots used at the primary and, in case of a contest, transmit them to the "Registrars of Voters" for an official count.§ Finally under the Virginia act ‖ applicable to Richmond the primary officers are appointed by the county judge from lists submitted by the candidates; and in the city of Wilmington,¶ they, together with an official known as the "Qualifier of Primary Election Officers" are paid for their services at public expense.

The principle, of which a partial application appears in the foregoing acts, has been logically carried out in Missouri and Illinois, as well as in Ohio and New York, by acts transferring practically the entire management of primary elections to public authority.

This step was first taken in Missouri. An act of April 18, 1891,** applicable to St. Louis directs the "Recorder of Voters" to fix the time for holding primaries; divide each ward into primary districts; designate polling places; prepare official primary ballots; appoint judges and clerks from lists submitted by the candidates; provide the necessary election paraphernalia; and issue certificates of election to the persons receiving the highest number of votes. The expenses are paid from the proceeds of an assessment levied upon all persons whose names are printed on the ballots.

* Act of April 23, 1897, § 4.
† Act of May 27, 1897, §§ 11, 19.
‡ Act of June 30, 1892, § 1555.
§ Election Code of 1898, §§ 117, 126.
‖ Act of February 20, 1896, § 4.
¶ Act of May 27, 1897, §§ 7, 35.
** Applicable to political parties that polled more than one-fourth of the total vote at the preceding election.

Two years after the passage of this act its application was extended to Kansas City,* and in 1897 a new but similar law † was enacted for St. Louis.

Aside from the general principle which it embodies, the chief points to be noted in the primary legislation of Missouri are: (1) No rule is provided to distinguish the members of different parties; (2) the provisions are, in the main, general, leaving to the Recorder of Voters a wide field of discretion.

The Illinois law,‡ likewise, fails to prescribe a test of party membership, but in definite provision for matters of detail it marks a long step in advance. For the most part, the primary is conducted exactly as a regular election. A few preliminary matters are left to the discretion of the party authorities. Thus the committee is permitted, within limits prescribed by the law, to name a day for the primary, apportion the territory into primary districts, locate polling places, and also to select, from the judges and clerks of the election precincts within the district, three judges and two clerks to serve at the primary.§ But having performed these functions, its part is done. Thereafter, the primary is subject to the authority of the Board of Election Commissioners; and, with the exception of official ballots, it is conducted with the same formalities as a general election.‖

The act¶ in force in Cincinnati, Ohio, shows a still more complete application of the electoral system to the primaries. It establishes a general primary election for all parties, subject to all the provisions of the election law, except that separate ballot boxes and separate official ballots are provided for each organization participating.

To general features similar to those of the Cincinnati act,

* Act of April 19, 1893.
† Act of March 5, 1897.
‡ Act of February 10, 1898.
§ *Ibid.*, § 5.
‖ *Ibid.*, § 8.
¶ Act of April 25, 1898. *Vide* note p. 58, *supra*.

the New York law * adds a party enrollment and a definite test of party membership. The system of party enrollment is a modified form of a plan devised in Kentucky. † When a voter presents himself for registration, the inspectors after recording his name and address as heretofore, ask the question: "Do you desire to enroll for the purpose of participating in the primary elections of any party?" If he answer in the negative or decline to answer, the word "No" is written in the appropriate column; but if the answer be affirmative, the word "Yes" is written in the same place and the further question asked: "With what political party do you wish to enroll?" If not challenged, the voter is entitled to enrollment in the party he designates. But if challenged, he must make a declaration covering three points: (1) That he is in general sympathy with the principles of the party; (2) that he intends to support its candidates "generally" at the ensuing election and, (3) that he has not enrolled with or voted at the primary elections or conventions of any other party since the "first day of last year." ‡

In consequence of the last declaration, the voter who desires to change his party affiliation, at the regular time of registration in October, must have passed a year and nine months without claiming membership in any party. At a supplemental enrollment § held in the following May, the period of probation is five months shorter, only sixteen months having at that time elapsed since the first day of the preceding year. The rolls thus made up in October and supplemented in May are used in even years at a primary held on the first Tuesday in June to elect delegates to the state conventions, and annually at the September primaries. ‖

Under the New York law the primaries of all parties are

* Act of March 29, 1898.
† Act of June 30, 1892, § 1555.
‡ Act of March 29, 1898. Paragraph 3, Subdivision 2.
§ *Ibid.*, Paragraph 3, Subdivision 5.
‖ *Ibid.*, Paragraph 3, Subdivision 7. Paragraph 4, Subdivisions 1 and 2.

conducted at public expense by regular election inspectors, though not, as in Cincinnati, at the same place. Each primary district consists of two election precincts, and therefore includes two polling places. At one the inspectors and clerks belonging to the party which polled the largest vote at the last election, conduct a primary for the exclusive benefit of their own organization; while at the other a general primary for all remaining parties is conducted by the minority inspectors and clerks. The inspectors at both polling places have copies of the registration books containing the party enrollment; and affiliation with each organization is restricted to persons enrolled with it. But the vote of a duly enrolled elector, still a resident of the district, cannot on any ground be refused.*

One of the most interesting features of this act is the method of voting which insures secrecy without an official ballot. The ballots of different parties are distinguishable by color; but those intended for the same party are of identical color, weight and texture and therefore when folded cannot be distinguished from one another. All candidates so desiring deposit their ballots with the election officers. When a voter presents himself and is found duly enrolled, he is given one ballot from each lot deposited for the use of his party, and retires to a booth. Returning with all the ballots folded, he delivers to an inspector the one he intends to cast, and then, waiting till it is in the ballot box, returns all the others, which are placed in another box and afterward burned without examination. As no one can tell by observation which of the ballots given the elector was placed in the ballot box, secrecy is secured.† The other features of the act are for the most part similar to analogous provisions of the election law.

The foregoing sketch indicates the salient features of the primary legislation in force at the close of 1898. Amid all

* Act of March 29, 1898, Paragraphs 5, 6 and 7.
† *Ibid.*, Paragraph 7, Subdivision 1.

the variety of detail we see little more than the application of methods in vogue at the regular election. Problems which because peculiar to the primary, are incapable of solution through forms borrowed from the electoral system, have usually been neglected.

The most conspicuous instance is the qualification for voting at primary elections. On this point most acts are very indefinite. Several states merely restrict participation to "legal electors;" * others to "legal electors possessing such additional qualifications as the party committee may prescribe;" † while Illinois,‡ Maine,§ Michigan,‖ Missouri (St. Louis) and Ohio (Cincinnati) ¶ add such vague and meaningess provisions as "none but members of the party" or only persons who have "before affiliated with the party" shall be permitted to vote. What shall be the test of party membership only three or four states seriously attempt to determine. Under the Wisconsin** act all who supported the party ticket at the last election are eligible to vote at the primary. The principal test prescribed by the New York law though different in form is similar in effect. The voter declares when applying for party enrollment that he intends to support the ticket "generally" at next election. †† But as the roll then made up is not used at a primary until several months later, by which time "the next election," to which declaration referred, has become "the last election," the condition is really the same as in Wisconsin.

Under the Montana laws a challenged voter is offered the alternative of swearing that he has been in the past identified with the party, or that he intends to act with it at the

* Arkansas, Michigan, Missouri, North Dakota and Texas. The provision of the Oregon law is substantially the same.

† Delaware, Florida, Kansas, Kentucky. Maine, Massachusetts, Mississippi, Nevada, Ohio, Washington, West Virginia and Wyoming.

‡ Act of February 10, 1898, § 11.

§ Act of March 26, 1897, § 4.

‖ Act of May 13, 1895, §§ 7, 8, and Act of May 16, 1895, § 9.

¶ Act of April 25, 1898, § 4.

** Act of April 23, 1897, § 8.

†† Act of March 29, 1898, *Vide, supra.*

ensuing election; while Minnesota * requires a declaration covering both the past and the future. Such rules are satisfactory to the partisan but preclude independent voting on election day. A recent California law,† which has been declared invalid by the State Supreme Court,‡ effected an interesting compromise between the claims of the strict partisan and the independent. The act of voting was legally construed as the declaration of a *bona fide present* intention to support the party ticket at the ensuing election. Such a *present* intention might, of course, be honorably changed after the nominations had been made.

It is not surprising that State legislatures have avoided the problem of defining party membership. Simple as it may appear, it is hardly capable of a satisfactory solution. While, for obvious reasons, those who do not intend to support the candidates of a party should be excluded from its primary; it is impossible to enforce such a restriction without denying the citizen that freedom of choice on election day which our political system contemplates. If we require the voter to promise in advance to support the nominees of the party in whose primary he participates, we obviously either prevent independent voting or deprive independent voters of all influence over party nominations. Similarly when affiliation with the party at the last election is made the test, the voter is tempted to support unfit candidates in order to maintain his party standing. On the other hand, if we would freely permit independent voting, we must allow citizens to vote at a primary without assuming any obligation to abide by its action. The interests of the primary and of the regular election being thus in conflict some compromise must be adopted. Just what compromise will prevail it would be idle to predict.

Primary legislation has not yet attempted to do more than guarantee the honest casting and counting of votes. There

* Act of April 25, 1895,
† Act of March 13, 1897.
‡ Spier *v.* Baker, 120 Cal. Rep. 370.

has been, apparently, no general recognition of the fact that a system which strictly precludes fraud and corruption may nevertheless totally fail to reflect the sentiment of the majority. The method of selecting candidates—a matter of no less importance—has usually been disregarded. In some states the previously existing system is legally recognized; but as a rule the whole matter is left to the discretion of the party committee. Throughout the southern states, the general practice is to nominate by direct popular vote, while in the north and west the convention plan prevails.

If the analogy of the regular election should continue to guide legislatures, we may expect to see the direct vote made mandatory. But it is highly improbable that such a system would prove a final solution of the nominating problem. The direct vote, though possibly well adapted to the conditions of some southern states, where a relatively small upper class still maintains political leadership leaving to the rank and file of citizens only a *yea* or *nay*, is radically ill-suited to the more democratic conditions of the north, especially of the great cities. Its adoption would mark the formal abandonment of majority rule. A majority election by a heterogeneous body without natural leaders is rarely possible except after deliberation and a number of ballots; and even though we concede that the newspapers furnish a medium for ample discussion, it will hardly be contended that it would be practicable to hold successive primary elections until one candidate should receive a majority of the votes. Some form of indirect nomination appears, therefore, to be a necessity. Is it not possible to devise a system which will insure the election of a truly representative convention? Upon this problem primary reformers should concentrate their efforts.

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